2582

NO. 12250

United States
Court of Appeals
For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY LOU SCHIEL and LORRAINE SCHIEL,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, A Corporation,

Appellee.

Opening Brief of Appellants

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INDEX

CONTENTS

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JURISDICTION

This suit was brought by New York Life Insurance Company, a New York Corporation, for reformation of a reinstated life insurance policy issued to Frank Schiel, Jr., who had been killed in action, and asking judgment against appellants, citizens of Arizona.

Appellants answered contesting the reformation, and cross-complained asking recovery of the insur-

ance. The jurisdiction of this Court and of the District Court attaches under Judicial Code Sec. 24 (28 U.S.C.A., No. 41) and Sec. 128 (28 U.S.C.A. No. 225). No direct appeal is allowed to the Supreme Court (O'Brien Manual Fed. Appel. Proc., 3rd Ed., page 255). A final summary judgment was entered for appellee on March 9, 1949 (R69); motion to set aside the judgment and for new trial was filed March 9, submitted March 21, and denied April 6, 1949 (R73). Notice of Appeal was filed April 19, 1949 (R73). The appeal is on the final judgment and the whole case and each and every cause of action and matter in controversy, including the ruling on the preliminary equity issue allowing reformation, (R53) (Arnold v. U.S., 263 U.S. 427; Union Central v. Burger 27 F. Supp. 555).

STATEMENT OF THE CASE

There is no evidence, except the Stipulation of Facts on Reformation (R41); and the admissions of appellee seeming to admit our allegations (R40). Our statement is therefore based on pleadings and other papers. Appellants emphasize that the record shows there was no trial at which evidence was admitted to support the complaint. Appellants never had opportunity to offer any evidence or to answer any evidence if it had been offered on the manner of death or other issues.

In 1935 Frank Schiel, Jr., the insured aged 18, was issued a life policy for $5,000 by the appellee.

Appellants were beneficiaries. The policy had a two year incontestable clause, excepting only non-payment of premiums, disability and double indemnity benefits (R13). It also had a "military" clause making it free of conditions of occupation and military service (R13). It included Arizona statute requirements that the policy constituted the entire contract and no statement shall be used in defense unless a copy be indorsed upon or attached to the policy *when issued.* (R13). The policy could be reinstated within five years from default upon evidence of insurability and payment of arrears in premiums. (R9).

The policy lapsed because of non-payment in 1936 and within five years the insured applied for reinstatement. His application (in a part never attached to the delivered policy) stated that he was desirous of taking aviation training (R19). This country was not at war then. The company demanded that he sign a request for cancellation of double indemnity benefits, and that an aviation clause "A" be added. No reinstatement would be made otherwise (R50). The original policy had no aviation clause.

The policy was delivered as a reinstatement March 29, 1939. It had the double indemnity clause, and mention thereof on the front page, stamped "Void" in large letters (R7). But no copy of the questionnaire on "Aeronautical" activities (R19) and no aviation rider was indorsed or attached and

no copies were given insured. After the reinstatement the company had the policy up again May 1, 1939, for a "Settlement Agreement" (which also was never attached to the policy, R15).

The insured later trained for aviation, became a member of the American Volunteer Group (R63) in China and when this country declared war he remained and became a Major in the Air Force. He was first reported missing in action, and then as killed in action on December 7, later corrected to December 5, 1942, (R103). Death in action was said to be due to "plane crash." No reports state he was "piloting" a plane as stated in Findings (R68). All reports were hearsay as there was not any witness to any crash and the plane and his body were found in a remote region. (R64).

Proofs of death were furnished the company. The latter declined to pay insurance and tendered the alleged reserve of the policy, claiming that death came under an aviation clause which it contended excused payment. Beneficiaries had never seen or known of this clause which was not attached to the policy left by the insured. The tender was declined. The company brought this suit in July, 1943, asking reformation on allegation of mutual mistake and for addition of the aviation rider; alleged that death came within the rider (R4). The beneficiaries, appellants, resisted the suit, on the ground that the incontestable clause barred any reformation; they

denied there had been mutual mistake; denied that death came under the aviation rider, and defended on the ground that the rider was not attached when the policy was issued, either originally or on reinstatement; and demanded payment of the insurance. (R25-33). Rule 13 (a) Civil Proc. makes it compulsory to set up any counterclaim (Union Central Case cited above).

At direction of the court (R34-35) the demand made in answer for the insurance was repeated by a cross complaint, to which answer was made by appellee, before hearing on the reformation issue (R30-39).

The court first took up the reformation part, by stipulation of facts (R41).

Reformation, merely adding the aviation rider to the policy, was ordered in 1945 (R53); leaving open for decision and final judgment whether, as claimed by appellee, death occurred under conditions bringing it within the aviation rider, and for decision on other issues, the cross-complaint, amendments and answers. No trial was ever held although requested (R33).

After numerous pleadings, contested by both parties, the appellee on November 24, 1948, moved for summary judgment (R59). Objection was made by appellants (R61). The court entered minute order granting summary judgment for appellee on January 14, 1949. Findings of Fact and Conclu-

sions of Law were presented later by the appellee, objection was made by appellants, and after making changes the court entered the Findings, Conclusions and Judgment (the only judgment signed in this case) on March 9, 1949. Appellants filed motion to set aside and for new trial. April 6, 1949, the court entered order denying the motion. Notice of appeal was filed, bond was given and statement of points served and filed.

QUESTIONS PRESENTED

1. Was reformation properly allowed after more than two years stated in the incontestable clause had passed?

2. If reformation is allowed to stand, does the aviation rider merely added thereby destroy the assurances in the incontestable and unchanged military clause making the policy free of all conditions of such service, and of other clauses that had become incontestable?

3. Was this a proper case for a summary judgment for appellee?

APPLICABLE PARTS OF ARIZONA STATUTES
(Arizona Code Ann., 1939)

Sec. 61-705. Mandatory provisions in certain life policies—no policy of life insurance . . . shall be issued or delivered unless they contain the substance of the following provisions:

3. That the policy constitutes the entire contract between the parties and is incontestable after not more than two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war; . . . that no statement shall be used in defense of a claim under the

policy unless contained in a written application and unless a copy of such statement be indorsed upon or attached to the policy when issued.

Also Sec. 61-107 that unless a correct copy of application is attached to the policy it shall not be considered a part or received in evidence.

SPECIFICATION OF ERRORS

(R74 for Statement of Points)

The District Court erred, to the prejudice and injury of appellants, in:

1. Allowing reformation of the reinstated policy for alleged mutual mistake (R3), because there was no such mistake; under the policy the insured had the right to reinstatement without aviation rider demanded by insurer; and there was no consideration moving to insured for the request he was required to sign.

2. Allowing reformation, because the order of reformation is not sustained by the stipulation of facts (R41); and there was no mutual mistake.

3. Allowing reformation and later giving summary judgment (R69), because more than two years elapsed after acceptance of the reinstated policy before suit for reformation was brought, after death of insured.

4. Striking from the pleadings of appellants allegations material to their defense and action for recovery; including allegation that insured met death as a battle casualty in military service (30-93). This issue was essential if the military clause is not to be ignored and given no effect.

5. Allowing reformation and in allowing the aviation rider as the defense, and giving summary judgment, for the reasons that said rider was not attached to the policy "when issued"; and permitting the rider to be the defense was a violation of the un-

indorsed contract clause (R13), and of the Arizona Statutes, above.

6. Giving the final judgment, because at the time of suit asking reformation merely by adding the aviation rider, all other clauses had already become incontestable. Said other clauses, including the military, cannot be violated and made void by the aviation rider. The court by allowing this rider as a defense violated the incontestable clause as well as the military clause.

7. Giving final judgment to appellee, because even if it had been proved (no evidence was ever admitted) that insured was killed within the conditions of the aviation rider, his death was a battle casualty, a risk of war in military service, and not a risk of aviation under the rider.

8. Allowing reformation and giving summary judgment, because neither the incontestable clause nor the military clause (R13-26) was indorsed to give notice of modification and of elimination of a risk through the addition of an aviation rider, an exception to risks.

9. Giving the final judgment, because no trial was allowed. Appellants, even if it were material whether insured was killed in a plane crash within all provisions of the aviation rider, never had opportunity to offer evidence. The findings, on unadmitted testimony and the summary judgment, are unsupported (R67). There is no evidence that insured met death under the rider which withdrew risks covered by the original and reinstated policy as issued.

10. Granting summary judgment, because:

1. There were genuine issues including: Denial by appellants that death was caused as appellee alleged; and denial (R30) of the arbitrarily stated "reserve" tendered (R39). There was no evidence

ever admitted that death was within the aviation rider.

2. This was a cause involving several issues of law and fact, including reformation. It was not a case for summary judgment for the company on the contested issues. Appellants were entitled to summary judgment if one was to be given without trial, as there was no evidence to support appellee.

11. Giving the final judgment, because there are ambiguities; one is created because the military clause is without indorsement of any modification. And a reasonable interpretation is that the aviation rider did not cover war conditions or aviation in battle during war, but only aviation in peace time or not under battle conditions in war.

12. Giving the final judgment to appellee, because appellants, on the record that can be considered, are entitled thereto as a matter of law as well as of fact, not only on the reformation issue, but also because there were genuine issues and no competent evidence was admitted to support the findings and summary judgment (R67).

SUMMARY OF ARGUMENT

I. Reformation ordered in 1945, as the equity part of the issues (R49-53), allowing addition of the aviation rider, was prejudicial error, because: Reinstatement in 1939 should have been permitted without demand by appellee for elimination of risks (R2-9) reinstatement clause); the rider (as well as the Aeronautical Questionnaire, R19) was not attached to the policy when issued (R7-31); there was no mutual mistake shown; and this was a contest in violation of the incontestable clause.

II. But even if reformation were allowable,

summary judgment, or any judgment, for appellee was prejudicial error, because:

A. If there had been competent evidence that death came under the aviation rider, the death was nevertheless a battle casualty in military service (R30-94-104), a war risk, not an aviation risk; and

B. The clause making the policy free of conditions as to military service, which had become incontestable, and that making the policy incontestable after two years except for the specific exceptions named therein, were not indorsed to show any restriction of the unlimited risks of military service (R13-26); and such unindorsed clauses are superior to the rider which is an exception to risks. (Canton v. Woodside, 90 Fed. 302).

C. These clauses, unindorsed and without indication or fair notice of a modification of risks, if any modification was intended, created ambiguities that must be decided favorably to appellants.

III. Further, giving summary judgment for appellee was prejudicial error, because: There were genuine matters and issues of fact under the pleadings, and of law; and the Findings, Conclusions and Summary Judgment (R67) are not supported by any admitted evidence.

ARGUMENT

I.

REFORMATION WAS ERRONEOUSLY GRANTED

Reformation was ordered by minute order as a preliminary equity issue, decided first in course of the proceedings on the merits of the answer, cross-complaint and answer thereto, that had been filed (R25-35-39). Ordering reformation by allowing the aviation clause or rider to be added to the policy after death of insured and after it had been reinstated for more than three years, was prejudicial error, for several reasons:

A. The policy issued in 1935, had lapsed in 1936, and application to reinstate was made within the time permitted. The company refused unless the insured signed a request cancelling double indemnity, and for addition of the aviation rider. (R21). This latter reduced the risks assumed in the original policy. The insured, untrained in insurance matters, received no consideration for signing that request. It violated his right to have the policy reinstated with the same provisions and risks as originally. Signing this request did not make a contract. The policy as issued and accepted was the contract. A change was made in the risks assumed; no change had occurred in the health or insurability. If an insurer can require a reduction in risks assumed before allowing

reinstatement, then the "right" to reinstate if of no value.

..Lanier v. N. Y. Life, 88 *F.* (2*d*) 198-199 (*CA* 5*th*) states: "In order to apply the incontestable clause it will be helpful to see how and when the reinstatements occurred. They were not wholly new and independent agreements. . . It has been said that reinstatement when the conditions are met is a positive right and may be specifically enforced."

Belser v. Mutual Life, 77 *F. Supp.* 826 shows that an insurance company cannot on reinstatement require such clauses, exempting war risks or other risks, by claiming they are matters of insurability. *Franklin Life v. Parish*, 109 *F.* (2*d*) 276 (*CA* 5*th*) states that a reinstatement of a policy results in putting the old contract back in force with the general provisions unchanged. Also see *Bowie v. N. Y. Life*, 105 *F.* (2*d*) 807 (*CA* 10*th*).

B. When the policy was reinstated and "issued" in 1939, it admittedly did not have any aeronautical questionnaire or aviation rider attached and no copies were ever given to insured (R43). He was warranted in considering that the policy as issued with double indemnity voided, was the final, acceptable to the company, irrespective of what the preliminary negotiations may have been, and that he could rely on the unchanged military clause. The company, after his mouth is closed by death, cannot equitably claim that the policy as delivered was not one that the insured could depend on.

Federal Casualty v. Howe, 38 *F.* (2*d*) 741 holds: Unless a correct copy (of application) is attached when the policy is issued, it shall not be received in evidence against the insured.

Stillman v. Aetna Life, 240 *Fed.* 466,468: "The statute imposes upon the insurance company the duty of attaching a true copy of any application or representations of the insured which by the terms of

the policy are made a part thereof, and of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy; and the omission to do so shall forever preclude it from alleging or proving any such application or representation. No amount of discussion can make this provision of the statute plainer or obscure its meaning."

N. Y. Life v. Cohen, 48 *F.* (2*d*) 903: The application is a proposition. . . The company may relinquish or waive. Also *Corley v. Travelers,* 105 *Fed.* 858, 862, *N. Y. Life v. Hardison* (*Mass.*) 85 *N. E.* 410, *McKelvie v. Mutual Benefit,* 287 *Fed.* 660, (*CA* 2*d*), *McMaster v. N. Y. Life,* 99 *Fed.* 864, 866 (*CA* 8*th*).

C. To obtain reformation the company alleged mutual mistake, as a mere conclusion (R3). The insured had died. His version could not be given. The company had the policy up at least once after reinstatement, to add the "Settlement Agreement" (R16), and had opportunity then to correct errors if any.

The stipulation of facts shows no clear and unequivocal evidence of such mistake, as required by all well considered cases. And the Conclusion of Law (R52) that there was mutual mistake is not supported by evidence such as is demanded in a mutual mistake case. The offered conversation with the insured, in the Stipulation was competent, (R47) New York Life v. Mason (CA 9th) 272 Fed. 28. The evidence is clear that the mistake, if any, was that of the skilled employees of appellee.

Dutton v. Prudential (*Mo.*) 193 *S.W.* (2*d*) 938

states: On mutual mistake the evidence must be so clear as to exclude any reasonable doubt. Mere preponderance is not sufficient. "Courts of equity do not grant reformation on probability. . . .but only on certainty of error."

In *Metropolitan Life v. Asofsky*, 38 *F. Sup.* 464 the court states that the "insurer's dilatoriness. . . . in failing to . . . discover its error . . . places it in a position where it cannot in equity and good conscience seek relief." Also see Hayes v. Travelers, 93 F. (2d) 568.

D. This policy had a two year incontestable clause. It was originally issued in 1935, was reinstated in 1939, suit for reform was not brought until July, 1943, after death of the insured in December, 1942 (R51). Cancellation is not allowed after death of an insured (Terry v. N. Y. Life (CA8) 104 F (2d) 501. Reformation, substantially like cancellation, should also be denied. The suit was a contest, as decided by this Court recently, with irrefutable logic and equity, in the Richardson case, below. Previous cases also state like principles. A few of many cases are cited below. The order allowing reformation violated the incontestable clause in this case at bar. That reformation, the only defense of appellee, should be reversed.

Richardson v. Travelers, 171 *F.* (*d*) 669 (*CA 9th*):

This recent case is conclusive. The company there had made a mistake in the type of policy issued. In our case, through alleged mistake the reinstated policy was issued without the rider, and accepted by the insured who paid premiums until his death. The

Schiel case seems even stronger because (1) this was a reinstatement, (2) reformation was not sought until after death and after the policy had become incontestable, and (3) the Arizona Statutes direct that no statement shall be used in defense or received in evidence unless a copy be attached to the policy "when issued." This Court says: "If a suit for reformation were held not to involve a contest of the provisions to be reformed, the insured would be deprived of the very confidence which the incontestable clause was meant to install as to the face value of life insurance policies. This purpose fortifies the construction we have given the clause, and operates to preclude an attack upon the terms of the executed policy through an action for reformation.

"We have had less difficulty in arriving at this result because of the well-settled rule that the defense of fraud is barred by the incontestable clause contained in an insurance policy. It does not seem reasonable to bar the raising of fraud as a defense and at the same time allow the insurer to gain reformation for its own benefit on the ground of an alleged mistake of its own skilled employees."

Mutual Life v. Markowitz, 78 *F.* (2*d*) 398 (*CA 9th*) says that the (incontestable) clause clearly provides that the company saved its right to contest only in matters arising from the restrictions and provisions "specifically" set forth therein.

Also: *N. Y. Life v. Kaufman*, 78 *F.* (2*d*) 399 (*CA 9th*) at 403, Horwitz v. N. Y. Life, 80 F. (2d) 297, 301 (CA 9th), N. Y. Life v. Hiatt, 140 F. (2d) 752 (CA 9th), Mutual Reserve v. Austin, 142 Fed. 402 (CA 1st), Wright v. Mutual Benefit, N. Y., 16 Am. St. R. 749, cited in Richardson case, Dibble v. Reliance Life, 170 Cal. 199, also cited in Richardson, Fidelity Co. v. Bilquist, 108 F. (2d) 713 (CA 9th), Bowers v. N. Y. Life, 68 Fed. 785, Travelers v. Henderson, 69 F. (2d) 762 (CA 8th), McConnell v. Prov-

ident Life, 92 Fed. 771, Harrison v. Hartford, 30 Fed. 862, Blatz v. Travelers, 68 N. Y. S. (2d) 801, Bernier v. Pacific Mutual, La., 88 A. L. R. 765; Arnold v. Equitable, 228 Fed. 157.

If, as seems certain on basis of the Richardson case, reformation should not have been allowed, and the order granting it is reversed, the Court need not consider the remainder of this brief and argument. We submit that judgment would be entered for recovery of the $5,000 insurance by the appellants under the terms of the policy, and for interest on overdue payments.

II.

REFORMATION WAS NOT DECISIVE OF THE CASE AND THE RIDER ADDED IS NOT A DEFENSE

Even if the reformation is allowed to stand, that by no means decided the case. The reformation simply added the rider; no other clause of the policy was requested to be reformed in the complaint (R5). All these other clauses and provisions had long since become incontestable. Anything in the added aviation rider that conflicts with the clauses that had become incontestable can be of no validity or effect to violate them. A blanket phrase in such an exception rider cannot be of any effect, or any notice of modifications that might be attempted to be made in other specific clauses.

Can an insurer, by adding a separate exception-

to-risk rider, having a blanket statement "Anything in this Policy to the contrary notwithstanding," charge an applicant with notice that other clauses, not indorsed to show any change, are not in fact true statements to be relied upon. The clause here (R26) making the policy free of conditions as to residence, travel, occupation, and military or naval service, states the only exceptions are conditions relating to Double Indemnity and Disability Benefits. If another exception can be included in a separate clause in another part of the policy, then an inexperienced applicant is misled, and in reality deceived, when he reads the military clause "free of conditions." If an applicant must at his peril read these voluminous policies and search for possible exceptions to clearly stated clauses, then insurance is uncertain and dangerous for any one who is not an expert in contract interpretations.

In *N. Y. Life v. Hiatt, supra*, this Court says in regard to notice: "Here the insurer could easily have avoided ambiguity and eliminated all deceptive repugnancy by adding to the stamped matter some brief expression calling attention to the limitations contained in the rider. If for example, the declaration had read 'Double Indemnity for accidental death. as restricted and defined on page 5 hereof', or language of similar import."

If a reformation, by adding one rider, could change all other clauses that have become incontestable and that have not been specifically reformed, and so indorsed, then incontestability as guaranteed

by the policy and by statute is defeated. This reformation, simply adding the aviation rider, did not determine how that affected other clauses that had become incontestable, or the statutes of Arizona, or make a final decision of the issues. Either the plaintiff or defendants might prevail; which would was not decided until the summary judgment.

Can clauses that have become incontestable, and do not have any indorsement of restriction, be nevertheless restricted, indirectly, by another clause merely added as a reformation after the period of contestability?

Can the addition of the aviation rider be ipso facto allowed to violate the "contract" clause, for instance (R13)? This clause had become incontestable long before suit. If it could have been subject to a request for reformation, a court would not set aside public policy; that clause follows Arizona Statutes Secs. 61-705 (3) and 61-707, supra, in requiring that all statements shall be attached to an insurance policy "when issued." Such a requirement cannot be waived:

Prudential Co. v. Niland (*N.J.*) 93 *A.L.R.* 381: States that the requirement of statutes "cannot be waived by the insured, since such statutes do not confer a mere personal right but establish a policy." See also Blatz v. Travelers and Bernier v. Pacific Mutual, supra.

Likewise, the military clause, making the policy free of conditions as to occupation and military serv-

ice (R13), had become incontestable. It seems axiomatic that if anything in the added aviation rider conflicts with the said military clause, the latter is superior and must stand unchanged. The military clause is also superior for the reason that the aviation rider contains and is an exception to risks, and as an exception, it is inferior to the unchanged military clause which is not an exception, under the rule stated in Canton v. Woodside, above.

Further, even if reformation stands, the summary judgment was prejudicial error under the policy as so reformed, because:

A. It is admitted that death was a battle casualty (R68); and if there had been proof, or if it be conceded for purpose of argument, that death was due to a plane crash occurring *within* the aviation rider, the death was nevertheless a risk of war under the military clause. It was not a risk of aviation, except as the casualty was a military condition brought about or contributed to by plane crash, instead of by shell explosion or some other military condition.

Boye v. U. S. Service Life, 168 *F.* (2*d*) 570 (*CA Dist. Col.*): Boye was the pilot of a plane on a bombing mission to Germany in 1944. He was reported missing. The plane was last seen over Germany. No information except war records "duly admitted" was available as to circumstances surrounding its disappearance. It was believed to have been lost as result of enemy anti-aircraft fire. The policy had an aviation clause. The appellate court reversed a judgment for the insurer. It said it agreed with the dis-

trict court that "the known circumstances point strongly to death by enemy gunfire, or by flames from a burning plane or by *plane crashing upon the land* or falling into the sea. But we cannot agree that death so caused it 'due to operating or riding in any kind of aircraft'." It resulted "from a risk of war that the policy did not exclude."

Bull v. Sun Life, 141 *F.* (2*d*) 456; *cert. den.* 323 *U. S.* 723: Lieut. Bull was on plane forced down onto the sea. An enemy plane strafed it. He was never seen again. Question was whether death was due to a risk of war or a risk of aviation, the policy having an aviation clause. The court says the true intent was to "include the risks of war," and that the death was solely due to "dangers inherent in a war risk." Aviation may have been "a contributing cause but that did not make death an indirect result of aviation."

Also: *Schifter v. Commercial Travelers*, 50 *N.Y.S.* (2*d*) 376; affirmed 54 N.Y.S. (2) 408; Paradies v. Travelers, 52 N.Y.S. (2d) 290 and Durland v. N. Y. Life, 61 N.Y.S. (2d) 200.

B. The clauses (R13) in the policy making it free of conditions as to military service, and incontestable after two years, were never indorsed with any modification. No notice was indorsed on the front page of the policy indicating any restriction of risks (R7). These unindorsed clauses are superior to any after inserted exception, as an aviation rider, if the latter purported to change the other clauses and the military risks assumed by the policy as it was reinstated and delivered. That rider says nothing about the military risks. If it did, that would not be sufficient without indorsement also on or in

the military or other clauses sought to be modified. The rider when considered in connection with the military clause, left unindorsed, is reasonably interpreted to refer to non-war aviation. The statement on the front page that all statements "on ensuing pages" are covered, and statement in the aviation rider "anything in the policy to the contrary notwithstanding," are not notice, under the Hiatt case in which this Court said "The printed general reference (on front page) to all provisions found on the ensuing pages does not fairly reach the point."

The Durland case, supra, also shows that the New York Life, on the same kind of policy with the same aviation and military clauses as in this Schiel case, but issued two years later, placed clear indorsement on the military clause "Except as provided by Aviation Rider Attached hereto." This shows that this Company recognized that such indorsement on the clause itself is necessary to give an insured fair notice.

Mutual Reserve v. Austin, supra: "The term 'Incontestable' is of great breadth. It is the 'policy' which is to be incontestable. We think the language broad enough to cover all grounds for contest not specifically excepted "in" (quotation marks supplied) that clause." Under this case exceptions to the incontestable, or military, clause, cannot be made by an aviation rider placed in another part of the policy, when no indorsement is made in or on the clauses themselves.

Also: *Provident Life v. Anderson*, 166 *F* (2*d*) 492 (*CA 4th*); Ness v. Mutual Life, 70 F. (2d) 59

(CA 4th), cited in Markowitz case supra; Berniar v. Pacific Mutual, Paradies v. Travelers, Durland v. N. Y. Life, and Schifter v. Commercial, supra; United States v. Patryas, 303 U.S. 341.

C. These unindorsed clauses at least created manifest ambiguities, which under all cases must be decided for the insured. As above pointed out the unindorsed military clause "free of conditions" leads anyone, especially one untrained in insurance, to believe that the aviation rider (if it had been attached when the policy was delivered) did not apply to military death in war as a battle casualty. That it only applied to civilian, or such non-war, aviation as would not come under a risk of war or military service resulting in casualty in war operations:

N. Y. Life v. Kaufman, 78 *F.* (2*d*) 403; cert. denied 80 L. Ed. 445, and N. Y. Life v. Hiatt, supra. Also Mutual Life v. Hurni, 263 U. S., 68 L. Ed. 238; Mutual Benefit v. Moyer, 94 F. (2d) 907 (CA 9th); Swazey v. Mass. Protective Assn, 96 F. (2d) 265; Canton v. Woodside, supra; Gits v. N. Y. Life, 32 F. (2d) 7 (CA 7th); N. Y. Life v. Cohen, supra, and Narber v. Calif. Life, 211 Cal. 176.

III.

THIS WAS NOT A PROPER CASE FOR SUMMARY JUDGMENT FOR APPELLEE

Also, the giving of the summary judgment was prejudicial error. All through the proceedings, as shown by the pleadings, there were genuine issues. In the answer (R30), appellants denied that death was caused as appellee alleged; also (R30, V1) de-

nied the allegations as to "reserve." The cross complaint set up issues also which appear to have been admitted by answer (R40). The court never allowed a trial to require appellee to prove its complaint. No opportunity was ever given appellants to introduce evidence; or any on war records (R100), (not a part of the record for consideration because never admitted in evidence). The deposition is simply indorsed "Filed" (R85). It was never offered or admitted as evidence. There is no showing that these were *all* the war records. At least one was only an an "extract" (R89-94), and they were subject to change and correction. No chance was given to object to their weight, as allowed under Title 28 U.S. C.A. No. 695, or to object to or rebut statements in the deposition. See also 26 C.J.S. page 943: Adverse parties are entitled to object to a deposition; and Rule 26 (e) Civ. Proc. gives a right, "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof." The deposition, (R86), shows contradictions and has opinion and interpretations of the witness. Can a company get a deposition, in a far place, and then have it made conclusive evidence, without any opportunity to object or rebut on the part of the opposite party who is not able to be represented on the taking of the deposition. The record on appeal shows the above were never admitted in evidence.

This case involved several issues, equity, ques-

tions of fact, weight of evidence (if any had been admitted on a trial for which a jury had early been requested). It was not a case for a summary decision for appellee on assumed facts and conjecture and by a determination of weight of such assumed evidence.

Wittlin v. Giacalone, 154 *F.* (2*d*) 20 (*CA Dist. Col.*): "It is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers." Summary judgment was reversed. Also Aronson v. K. Arakelian, 154 F. (2d) 234 (CA 7th); Hawkins v. Frick, same, page 88 (CA 5th); Zarate Co. v. Park Bridge Co., same, page 381 (CA 2d); Sprague v. Vogt, 150 F. (2d) 801 (CA 8th); Sartor v. Arkansas Co., 321 U.S. 627, 88 L. Ed.; Strauss v. Strauss, Cal., 203 P. (2d) 957; Minuto v. Mutual Life, R: I., 179 Atl. 713.

As there was no admitted evidence on the issue of manner of death, the findings, conclusions and summary judgment (R67) are wholly unsupported, and we submit that appellants were, and are, entitued to judgment. Even if the unadmitted deposition and records had been introduced, they fail to show that death came within the aviation rider. The burden was on the appellee to prove this in every respect. (Bebington v. Calif. Western, Cal., 180 P. (2d) 672). There is no evidence, as before stated, to support Finding of Fact 4 (R68) that the insured,

while serving as an officer in the U. S. Army was killed when the plane, he "was then piloting" crashed. No proof was ever offered to show that the plane was not licensed, or that death was a result of operating or riding therein. Death could have been due to injuries received before or after the alleged crash, or from enemy action or shock and exposure after landing. (64).

There was no evidence to support Finding of Fact 5 (R69) that the "reserve" was $448.80. The reserve was computed by the appellee on basis unknown. The appellee should have been required to prove all allegations by clear, unmistakable and unequivocal evidence, not by hearsay and conjecture, and by a mere unproved statement.

If the company made "mistakes" on the aviation rider, and in failing to attach the part of the application on aeronautics and the Settlement Agreement as before pointed out, are not appellants entitled to proof on its allegations, that it did not make another?

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed and judgment entered for the appellants for the full insurance of

$5,000, to be paid in accordance with the terms of the policy and with interest on the past due payments.

Respectfully submitted

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